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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 09-6338, Dillon v.
5 United States.

6 Ms. Freeland.

7 ORAL ARGUMENT OF LISA B. FREELAND

8 ON BEHALF OF THE PETITIONER

9 MS. FREELAND: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 Believing its hands were tied by a policy
12 statement created to prevent application of this Court's
13 decision in Booker to section 3582(c) proceedings, the
14 district court imposed a mandatory guideline sentence
15 that exceeded the maximum authorized by the jury's
16 verdict by more than six years. Sentencing commission
17 policy cannot override this Court's clear and
18 unambiguous directive to courts to treat the guidelines
19 as advisory in all cases moving forward, and any
20 interpretation of section 3582(c) that permits the
21 commission to mandate sentences must be rejected, not
22 only as matter of statutory stare decisis, but because
23 it would violate the Sixth Amendment.

24 In an effort to avoid this result, the
25 government elevates form over substance, arguing that

1 section 3582(c) proceedings are not sentencings at
2 the -- and that the sentence imposed is not a new
3 sentence. The government is wrong.

4 Section 3582(c) proceedings are sentencings
5 at which Booker's constitutional and remedial holdings
6 must apply. The --

7 CHIEF JUSTICE ROBERTS: What if the
8 sentencing commission just issued a new guideline and
9 said: Anyone with a -- a crack sentence, their sentence
10 is going to be reduced by 10 percent. That wouldn't
11 present any problems, would it?

12 MS. FREELAND: Mr. Chief Justice, I think it
13 would present precisely the same problems here. By
14 indicating an amount of time that a sentence could be
15 reduced, the sentencing commission would still be doing
16 precisely what it did here, which is setting a lower
17 level, mandatory lower level, on sentences that the
18 district court could impose.

19 CHIEF JUSTICE ROBERTS: But there's no --
20 but 3553(a) doesn't even come into play under my
21 hypothetical.

22 MS. FREELAND: I'm sorry, Your Honor.

23 CHIEF JUSTICE ROBERTS: 3553(a) doesn't even
24 come into play, so there's not a resentencing by a
25 judge. It is just an across-the-board policy, like

1 increasing good time credits.

2 MS. FREELAND: I disagree, Your Honor,
3 because Congress in this case decided to enact a
4 statute, 3582(c), that invokes the discretionary
5 sentencing power of the court.

6 CHIEF JUSTICE ROBERTS: Right, in -- in this
7 case. But in my hypothetical Congress hasn't done that.
8 It hasn't -- or the sentencing commission hasn't done
9 that. They haven't invoked the discretionary
10 sentencing. They just said: Across the board, 10
11 percent off.

12 MS. FREELAND: And, Your Honor, perhaps I
13 misunderstood, but once the sentencing commission acts
14 to revise a guideline under its power under 994(u) and
15 opts to make that amendment retroactive under -- I mean
16 994(o) -- and opts to make it retroactive under 994(u),
17 only the court has power to lower a sentence. Congress
18 in --

19 JUSTICE KENNEDY: Why is that? It's the
20 same hypothetical of the Chief Justice. I'm not
21 interrupting your -- your discussion with him. Suppose,
22 pursuant to permissible regulation, the BOP says: Just
23 file paperwork with us, and if -- and if you show that
24 you were under a crack cocaine sentence, you are going
25 to be reduced by X number of months, period. Just file

1 it. What -- is there a problem with that?

2 MS. FREELAND: And Justice --

3 Justice Kennedy, I think there would be. And again, I
4 don't mean to be dodging the question. The problem is
5 section 3582(c). Congress clearly indicated that it
6 wanted these types of reductions to be treated
7 differently than those under 3624(b), which are
8 delegated to the Bureau of Prisons. And those types of
9 reductions --

10 JUSTICE KENNEDY: But the -- the
11 hypothetical is Congress doesn't do this. The
12 hypothetical is that Congress just tells the BOP: Find
13 out who's in on crack cocaine and release them --
14 whatever, 20 months early. What is wrong with that?

15 MS. FREELAND: Your Honor -- Your Honor, if
16 Congress chose to draft a statute similar to 3624(b) to
17 empower the Bureau of Prisons to act whenever the
18 commission lowered a guideline or -- or changed a
19 guideline under 994(o), I agree with Your Honor. It
20 would not present the problem here.

21 JUSTICE KENNEDY: Okay. Then the Chief
22 Justice's hypothetical, at least for me, meant: What --
23 why should there be a difference?

24 MS. FREELAND: The difference, again -- and
25 I don't mean to be dodging your questions. The

1 difference is that Congress acted in two very different
2 ways here. It enacted 3582(c) to deal with reductions
3 in sentence that are -- that are prompted by revisions
4 to the guidelines, and it enacted 3624(b) to deal with
5 revisions that are prompted by good behavior. And
6 the --

7 JUSTICE SOTOMAYOR: What is the
8 constitutional difference that would ignore a Sixth
9 Amendment right in the resentencing by the court that
10 doesn't when it's a resentencing or a modification of a
11 sentence by the Bureau of Prisons?

12 MS. FREELAND: Justice Sotomayor, I think
13 the difference would be that when it is delegated to the
14 courts under a statute like 3582(c), the court is then
15 dealing with a mandatory guideline range, and the Sixth
16 Amendment problem arises when the court sentences the --

17 JUSTICE SOTOMAYOR: But is this truly a new
18 sentence -- meaning a person serving a sentence, this is
19 an act of clemency. Whether the Bureau of Prisons does
20 it or the court does it, why should we introduce a
21 different binding or non-binding constitutional limit on
22 one body rather than the other?

23 MS. FREELAND: Justice Sotomayor, I disagree
24 with the premise of your question that this is an act of
25 clemency similar to the reductions for good time

1 behavior.

2 The -- the term "clemency," "leniency,"
3 "grace," connotes the idea that you deserve to be
4 punished for this, but we are going to -- we are going
5 to exercise leniency --

6 JUSTICE GINSBURG: Ms. Freeland, may I take
7 you on another path, not the question of the difference
8 between the two -- two sections. You have a large
9 prison population, and then Booker comes down, and then
10 the guidelines change only as to crack cocaine, nothing
11 else. All of the others whose sentence has become final
12 cannot get into the court's door because they don't have
13 the entering wedge.

14 In what system -- what fair system would
15 say, aha, because the crack cocaine guideline was
16 reduced -- the disparity was reduced -- these people are
17 now going to overcome the finality bar, but all of the
18 others who are identically situated with respect to all
19 other factors, they don't get their sentences revised?

20 MS. FREELAND: Justice Ginsburg, I have a
21 couple of responses to your question. The first is that
22 I think that a decision by a district court judge to
23 correct a sentence under 3582(c) should be analogous to
24 a decision of a district court judge to correct a
25 sentence under 2255.

1 Once the decision is made that the sentence
2 should be corrected, finality is extinguished; and when
3 the court goes about imposing the new sentence, it must
4 comport with the law of the land at the time.

5 JUSTICE GINSBURG: But why should, bearing
6 in mind that entire prison population similarly
7 situated, the courts say the finality bar is lifted only
8 to the extent that the crack cocaine guideline disparity
9 has been reduced?

10 MS. FREELAND: And, Your Honor, once the
11 finality bar is lifted, the concerns about retroactivity
12 should slip away. But with respect to fairness, which I
13 think is at the heart of your question, the fact that
14 this partial remedy for an urgent and compelling
15 problem, that is, the crack guideline, was afforded to
16 some should not prevent the Court from seeing justice
17 for those like Mr. Dillon, even though there are some in
18 prison that are serving unconstitutional sentences that
19 will not be able to seek relief.

20 Mr. Dillon is properly compared to other
21 defendants who are sentenced under the amended crack
22 guideline, not the original crack guideline. His
23 sentence is an amended crack guideline sentence, and for
24 purposes of avoiding unwarranted disparities Mr. Dillon
25 is most comparable to those other defendants that are

1 sentenced after the crack guideline.

2 JUSTICE GINSBURG: If you -- if you are
3 right that this benefit goes to -- only to the classic
4 can you get in the door, wouldn't that be a powerful
5 motive to the sentencing commission not to make its
6 guidelines reductions retroactive?

7 MS. FREELAND: Your Honor, I would certainly
8 hope not. 994 clearly contemplates that the commission
9 will undertake a constant review and revision of the
10 guidelines to make sure that they serve the purposes of
11 punishment. And 994(u) clearly shows that Congress
12 contemplated that some of those decisions would warrant
13 retroactive application.

14 If the commission were to respond to a
15 decision by this Court in Mr. Dillon's favor by refusing
16 to revise the guidelines in the future or refusing to
17 make any of those revisions retroactive, I submit that
18 it would be abdicating its duty under 994.

19 JUSTICE SCALIA: It wouldn't say that. It
20 just wouldn't do it. That's all.

21 MS. FREELAND: You are right, Your Honor.
22 It just wouldn't do that, but history would speak for
23 itself. The commission has constantly undertaken this
24 duty under 994.

25 JUSTICE SCALIA: Well, it is certainly a

1 factor that if I were -- if I were on the commission, I
2 would certainly take that factor into account. Every
3 time I make it retroactive, it is going to reopen -- it
4 is going to reopen the whole sentencing and -- and allow
5 a Booker application where -- where it didn't apply
6 before. How can I close my eyes to that if --

7 MS. FREELAND: Well, Your Honor --

8 JUSTICE SCALIA: -- if I am making the
9 retroactivity determination?

10 MS. FREELAND: Your Honor, if I could, I am
11 not suggesting that the commission close its eyes to
12 anything. However, what we are asking for in this case
13 is not a full resentencing where all sentencing
14 decisions would be reopened. We are simply saying that
15 when a court imposes a new sentence, that new sentence
16 must comply with this Court's decision in Booker.

17 CHIEF JUSTICE ROBERTS: Only Booker?

18 MS. FREELAND: And that means --

19 CHIEF JUSTICE ROBERTS: Only Booker? Only
20 Booker? What if there is another constitutional
21 objection to the sentence, and it goes back under --
22 under the crack cocaine? Can you say, oh, and, you
23 know, also, it violated my rights under equal
24 protection? You didn't notice that before, but here's
25 the argument. Is that before the sentencing court?

1 MS. FREELAND: Your Honor, I would have to
2 say that it is. The --

3 CHIEF JUSTICE ROBERTS: Yes, you would you
4 have to say so --

5 MS. FREELAND: The sentence imposed would
6 have to comply with the Constitution.

7 CHIEF JUSTICE ROBERTS: So it's not only as
8 unfair as Justice Ginsburg hypothesized. It's even more
9 unfair than that, because just because of the crack
10 cocaine change, somebody with an equal protection
11 challenge gets to raise that. Well, somebody in prison
12 without an equal -- with an equal protection challenge
13 but not the crack cocaine one is still stuck.

14 MS. FREELAND: That's true,
15 Mr. Chief Justice, but that's the case in any situation
16 where a defendant has raised an issue on appeal or has
17 presented a claim in a 2255 petition, and just by
18 happenstance the decision awarding them a new -- a new
19 trial or a new sentence happens when a new
20 constitutional rule is announced by this Court. Now --

21 CHIEF JUSTICE ROBERTS: Well, that's a new
22 constitutional rule. This is an old one. This is one
23 that was -- you know, the equal protection clause has
24 been on the books for a while. And -- and he -- he just
25 gets the chance to raise it solely because of the fact

1 that his conviction involved crack cocaine.

2 MS. FREELAND: And again, Your Honor, I
3 think that he would get to raise it, but I want to point
4 out that not every constitutional issue would be ripe
5 for the court's decision at that proceeding. If there
6 were an opportunity to raise -- as you said, equal
7 protection is not a new law as we are talking about
8 Booker being a new law for Mr. -- for Mr. Dillon. If
9 there were an equal protection challenge that had not
10 been lodged at the original sentencing, the district
11 court would apply the law of the case and --

12 CHIEF JUSTICE ROBERTS: Oh, no, no, no. I
13 thought under your theory this is a whole new
14 sentencing. So who cares if he waived it at the first
15 one. We are starting from -- from point zero.

16 MS. FREELAND: Mr. Chief Justice, I must
17 have misspoken. That is certainly not what I meant to
18 indicate. What I meant to say is, certainly, all
19 sentences imposed ought to comply with the Constitution.
20 But we live in a system that has waiver principles, law
21 of the case, mandate rule. These are all obstacles that
22 a defendant seeking to overturn a sentencing or raise an
23 issue on equal protection grounds that weren't presented
24 before would serve as obstacles to their doing so.

25 CHIEF JUSTICE ROBERTS: And my point is that

1 they shouldn't under your theory. The fact that he
2 waived it at the earlier sentencing under your theory
3 should not matter at all. Because your theory is that
4 this is a whole new sentencing, so who cares what went
5 on in the prior sentencing.

6 MS. FREELAND: I disagree, Your Honor, that
7 my theory does not encompass that part of the rule. And
8 I think with respect to our criminal history issue that
9 we have raised that is precisely what we said. That
10 there are errors that a district court may not be able
11 to correct in a 3582(c)(2) --

12 JUSTICE SCALIA: Well, why do you -- why do
13 you pick on -- on Booker as -- as not carrying over? I
14 mean if you say that there carries over from the prior
15 sentencing his failure to raise the equal protection
16 claim, why can't you say it's also law of the case that
17 the Booker objection doesn't stand? It's all the case.
18 It was decided before Booker, and that's the law of the
19 case as far as that's concerned.

20 MS. FREELAND: Well, Your Honor, if the law
21 of the case were in place before Booker was decided, the
22 new law would be an exception to the law of the case if
23 Mr. Dillon were resentenced as he were after the Court's
24 decision in Booker.

25 I'm not sure if that answers your question

1 precisely. For Mr. Dillon, Booker is new law at his new
2 sentencing. He did not have an opportunity to raise a
3 Booker objection or ask for a sentence below the
4 guideline range at his original sentencing.

5 JUSTICE SOTOMAYOR: Under your theory there
6 is no bar to an upward sentence by the -- by the judge,
7 because if it's a brand new hearing subject to Booker,
8 which mandates complete discretion under 3553, the
9 judges define the sentence that fits the crime and the
10 defendant. So you don't mind an upward --

11 MS. FREELAND: Well, under 3582(c), Your
12 Honor, the statute -- the statute provides that --

13 JUSTICE SOTOMAYOR: You only want part of
14 the statute, not the whole statute?

15 MS. FREELAND: Your Honor, I think we want
16 the whole statute, the statute --

17 JUSTICE SOTOMAYOR: If you want the whole
18 statute, then it's a new sentence. You can't -- and say
19 the statute limits up and down, but I only want the
20 down, and I want a new sentence.

21 MS. FREELAND: Your Honor --

22 JUSTICE SOTOMAYOR: It doesn't make sense.

23 MS. FREELAND: I think I understand your
24 point. The -- the problem is with the statute. 3582(c)
25 does not authorize a court to increase the sentence.

1 The fact that a sentence cannot be increased
2 does not divest the proceeding by which it is imposed.

3 JUSTICE BREYER: So what's -- what's the --
4 the words in the statute is that it may reduce the term.
5 You cannot change the term -- you cannot change a
6 sentence, except that you can reduce the term if such
7 reduction is consistent with applicable policy
8 statements.

9 MS. FREELAND: That's correct, Your Honor.

10 JUSTICE BREYER: Do you see anything --
11 what's -- what's unconstitutional about that? Then they
12 issue a policy statement, and the policy statement says
13 you can't reduce it except insofar as our new --
14 whatever the new thing is -- applies.

15 If you are arguing that that violates the
16 Constitution, what I am missing is, why? What violates
17 the Constitution there?

18 MS. FREELAND: Your Honor, post-Booker what
19 violates the Constitution is the policy statement's use
20 of the word "shall." That's a -- that's a
21 significant change in --

22 JUSTICE BREYER: I don't remember. I
23 thought in Booker -- and I have to go back and look at
24 it, but I thought in Booker the Court held that certain
25 specific -- like certain specific words in certain

1 specific provisions of the -- the sentencing statutes
2 were unconstitutional because of Apprendi and because of
3 the other part of Booker itself.

4 Well, 3582 wasn't one of them. So -- so
5 there must be something unconstitutional. If you are
6 right, I don't see how you get around this statute.

7 MS. FREELAND: Your Honor, in our view
8 3582(c) is not unconstitutional.

9 JUSTICE BREYER: All right. If it's not
10 unconstitutional, then why don't you have to follow it?
11 Because what it says is, you cannot get a reduction
12 except in respect to what the policy guideline says.
13 And the policy guideline says you don't get a reduction,
14 except insofar as we have reduced a sentence in a
15 particular respect.

16 What's unconstitutional about that? I'm --
17 I'm not saying there isn't. I want to know what your
18 argument is that it is unconstitutional.

19 MS. FREELAND: Justice Breyer, post-Booker
20 if 3582(c) is interpreted as you just said, that the
21 sentence -- the reduction in sentence must be consistent
22 with a particular policy statement --

23 JUSTICE BREYER: That's what it says. I
24 don't know how you would interpret it some other way if
25 that's what it says.

1 MS. FREELAND: And that the -- and that the
2 policy statement then requires the court to impose a
3 mandatory guideline sentence --

4 JUSTICE BREYER: No, it just says what we're
5 doing is we are reopening the sentencing in respect to
6 the particular way we reduce people's sentence, not in
7 respect to something else. That's what I read the
8 policy statement to say. That if there were 19 things
9 that were considered in the sentence and one of those 19
10 is changed in a downward direction, then it says we make
11 an exception, says the policy statement. You can reopen
12 No. 19, but not the first 18.

13 Now, why is that unconstitutional? What in
14 the Constitution prohibits doing that?

15 MS. FREELAND: The Constitution -- Your
16 Honor, if I could, the constitutional problem with
17 Section 1B1.10(b)(2)(A) is that it requires the district
18 court to impose a sentence within the guideline range.
19 Therein lies the problem. The requirement, a mandatory
20 guideline sentence based on a judicially enhanced range,
21 therein lies the problem.

22 Section 3582(c) does not mandate guidelines
23 sentencing. It's 1B1.10.

24 JUSTICE GINSBURG: Ms. Freeland, what would
25 happen if the -- the motion is made with respect to the

1 crack cocaine, and the judge said, I'm -- I'm not going
2 to -- I deny the motion. Would the judge then have to
3 go on and consider Booker and say, on this speech, I
4 deny the motion, but now I can just do whatever I want
5 with the rest of it?

6 MS. FREELAND: Your Honor, if I could, if a
7 judge is presented with a 3582(c) motion and denies the
8 motion, all the court has done is enter an order denying
9 a motion.

10 It's not until the district court decides to
11 grant the 3582(c) motion and reduce the defendant's
12 sentence that 3553(a) factors come into play, the policy
13 statements come into play, and a new sentence is
14 thereafter imposed.

15 JUSTICE GINSBURG: Well, if -- suppose
16 Congress and the sentencing commission had made it
17 crystal clear that they are authorizing a reopening but
18 only with respect to one piece. You say -- you say no
19 matter how clear it is, as a matter of constitutional
20 law, because Booker has been decided, the whole sentence
21 is up for --

22 MS. FREELAND: Justice Ginsburg --

23 JUSTICE GINSBURG: -- consideration?

24 MS. FREELAND: Justice Ginsburg, that is
25 correct. And the reason is because 3582(c) is a

1 provision that is used by courts to correct sentences.
2 Once the court decides that the defendant is worthy of a
3 correction, that the sentence should be corrected, it
4 grants a motion extinguishing the old sentence and
5 imposes a new sentence.

6 Our position is simply that when it imposes
7 the new sentence, it must comply with Booker's
8 constitutional and remedial holdings.

9 JUSTICE SCALIA: I have a better answer to
10 Justice Breyer's question. You want my better answer?

11 MS. FREELAND: Please, Justice Scalia.

12 JUSTICE SCALIA: Sure.

13 (Laughter.)

14 JUSTICE SCALIA: It's -- it's -- it's not --
15 it's not Section 3582 that is unconstitutional, and it
16 isn't even the provision for being guided by a policy
17 statement of the sentencing commission that's
18 unconstitutional. It is the nature of the sentencing
19 commission's policy statement that is unconstitutional.

20 Surely, if the sentencing commission had a
21 policy statement which said you will reduce it for white
22 prisoners but not for black prisoners, that would surely
23 be unconstitutional, right?

24 MS. FREELAND: Absolutely, Your Honor.

25 JUSTICE SCALIA: And your point here is that

1 the policy statement which says you effectively will
2 disregard Booker is unconstitutional?

3 MS. FREELAND: I agree.

4 JUSTICE SCALIA: That works, doesn't it?

5 MS. FREELAND: I agree. And, Justice
6 Breyer --

7 JUSTICE BREYER: You agree. Now -- now,
8 what -- that's what I -- I could understand that if 3582
9 said to the judge you resentence him. But it doesn't
10 say that. So there is a sentence in effect, and what
11 3582 says is a -- a sentence can be reduced just as if,
12 to go back to the beginning, Congress passed a statute
13 or the commission said everybody's sentence will be
14 reduced. That doesn't change what the sentence was. It
15 says there is a reduction, like for good -- good time.

16 So it says a defendant, if he has been
17 sentenced based on factor 19 in the case, the court may
18 reduce the term of imprisonment, the term of
19 imprisonment there under the sentence. So I'm back to
20 my question.

21 What is unconstitutional about that? And
22 what the court just says is the court -- the commission
23 says, that's right. You may reduce it in respect to
24 what we have considered. You may not reduce it in
25 respect to something which is not considered. So I'm

1 still puzzled about the constitutional problem.

2 MS. FREELAND: And, Justice Breyer, I
3 apologize because I may not be --

4 JUSTICE BREYER: No, no, you don't have to
5 apologize.

6 MS. FREELAND: -- I may not be understanding
7 your question.

8 JUSTICE BREYER: I understand your argument
9 now. And I didn't quite and I do. So there is nothing
10 to apologize for.

11 MS. FREELAND: Okay. I would like to --

12 JUSTICE BREYER: You wanted to get the idea
13 in my mind. I'm not expressing that in my question, but
14 I got your answer.

15 MS. FREELAND: Okay, thank you.

16 (Laughter.)

17 MS. FREELAND: A couple of points, though,
18 that I -- that -- from reading the text of the statute
19 that I would like to point out. Justice Breyer, notice
20 it doesn't say "sentence." It says "term of
21 imprisonment." "Term of imprisonment" is -- is a term
22 of art in the Federal Code. The "term of imprisonment"
23 is an authorized sentence under 3551 of the United
24 States Code. And under 3621, the Bureau of Prisons
25 cannot hold someone in custody absent a sentence of

1 imprisonment.

2 And in this case there are two judgments,
3 two sentences of imprisonment. The Bureau of Prisons
4 would not have been able to hold Mr. Dillon for
5 270 months under the 1993 judgment, and the Bureau of
6 Prisons certainly cannot hold Mr. Dillon for 322 months
7 under the -- the June --

8 CHIEF JUSTICE ROBERTS: I'm sorry. Why --
9 why could they -- the first part of that, why could they
10 not hold him for the term under the 1993 sentence?

11 MS. FREELAND: Under 3621 it's very clear
12 that the -- the Bureau of Prisons, absent a reduction
13 under 3624(b) for good time, is directed to hold the
14 defendant in the custody of Bureau of Prisons for the
15 term of imprisonment on the judgment.

16 In this case, following the --

17 JUSTICE SCALIA: What -- what if the
18 President reduces the sentence using his pardoning
19 power? He cuts it back; he cuts it in half. The Bureau
20 of Prisons has to hold him for the full term of the
21 imprisonment? No, that can't be true.

22 MS. FREELAND: Justice Scalia, I'm certain
23 that that's not true. And I mean there -- I am not
24 familiar --

25 JUSTICE SCALIA: So why is this any

1 different?

2 MS. FREELAND: -- with this provision.

3 JUSTICE SCALIA: Why is this any different?

4 I mean there are obviously -- what it proves is that
5 there are exceptions to that requirement that they hold
6 him for the term of imprisonment. They -- they have to
7 hold him for the term of imprisonment unless it has been
8 shortened, right, by -- by pardon or remission of part
9 of the term by the President or what the argument for
10 the government is, or by application of this retroactive
11 rule by -- by the commission.

12 MS. FREELAND: And again, Your Honor, I'm
13 not familiar with the clemency and commutation
14 procedures. I would have to think that some piece of
15 paper, some order directing the Bureau of Prisons to
16 reduce the sentence, just as a new judgment in a 3582(c)
17 is a new sentence of 270 months, would have to be
18 presented so that the Bureau of Prisons would release.

19 But -- but that aside, the -- the real point
20 here is that the new judgment is a new judgment; it is a
21 new sentence. This is not a reduction in the old
22 sentence.

23 JUSTICE BREYER: That is what it says. The
24 other thing that is bothering me, to tell you the truth,
25 is -- is the part of the point that was brought up

1 previously that it is up to the commission whether to
2 make it retroactive. It is?

3 MS. FREELAND: I agree.

4 JUSTICE BREYER: And I don't know why they
5 couldn't take into account that to make any drug-related
6 change, you see, and then make that retroactive, is
7 going to reopen the sentencing for every single person
8 who has already been convicted of a drug crime in the
9 Federal courts, of which there are probably tens of
10 thousands.

11 And -- and I think they would properly take
12 that into account. And, therefore, they might properly
13 say, we're not going to make this retroactive.

14 MS. FREELAND: Your Honor, the -- the
15 practice in the court of appeals post-Booker of
16 remanding all of the cases that were in the pipeline
17 shows that the Federal courts are able to handle
18 revisiting thousands of sentences imposed under a
19 mandatory system to revisit them under 3353(a). And as
20 Justice Walton said in testifying before the sentencing
21 commission with respect to this issue, that the courts
22 are fully prepared to handle any administrative burden
23 and believes that such a burden would be sufficiently
24 justified for people like Mr. Dillon who are deserving.

25 JUSTICE KENNEDY: I will make this brief

1 because your -- your rebuttal light is on. Your answer
2 made sense when we talk about term as opposed to
3 sentence, if you just look at (c). But (b) says
4 notwithstanding the fact that a sentence to imprisonment
5 can be modified -- a judgment or conviction that
6 includes such a sentence constitutes a final judgment.
7 Does (b) not apply to (c)?

8 MS. FREELAND: (b) does apply to (c), Your
9 Honor, and I'm glad that you raised that because 3582(b)
10 is significant in that it does not distinguish the
11 effect of finality of remands, modifications under
12 3582(c); it's the judgment of conviction -- the
13 conviction that remains final. The sentence is no
14 longer final. It's modified under any of the provisions
15 listed in 3582(b).

16 If there are no further questions I would
17 like to reserve the remainder of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, Miss
19 Freeland.

20 Ms. Kruger.

21 ORAL ARGUMENT OF LEONDRA R. KRUGER

22 ON BEHALF OF THE RESPONDENT

23 MS. KRUGER: Mr. Chief Justice, and may it
24 please the Court:

25 The provisions of the Sentencing Reform Act

1 at issue in this case, unlike the provisions that were
2 at issue in Booker, do not govern the imposition of
3 sentence. They instead provide a discretionary
4 mechanism for the exercise of leniency for defendants
5 who have already been sentenced. The district court in
6 this case properly exercised its authority under the
7 statute to reduce Petitioner's sentence by a little bit
8 more than 4 years, which was the maximum amount of
9 reduction that was consistent with the sentencing
10 commission's specifications under section 994(u) about
11 whether and to what extent its crack cocaine amendments
12 warranted reductions in already imposed sentences.

13 The district court had neither a further
14 obligation nor indeed the authority to set Petitioner's
15 sentence aside altogether and resentence Petitioner
16 under the advisory guidelines regime announced in
17 Booker.

18 JUSTICE GINSBURG: Does that extend to --
19 which was part of this case -- the court notices that
20 there was a technical error; it was a calculation error
21 the first time, and the judge says, well, I will fix
22 that up, too. That was an arithmetic error?

23 MS. KRUGER: Yes, Justice Ginsburg, the same
24 rule applies to the calculation error that Petitioner is
25 raising.

1 Section 3582(c)(2) was not designed by
2 Congress to serve as effectively a less restrictive
3 substitute for raising such challenges on direct appeal
4 or where otherwise available under section 2255. It was
5 instead designed for the limited purpose of providing an
6 opportunity to extend leniency to defendants whose
7 sentences are otherwise final, nonappealable and
8 therefore not subject to any modification.

9 Justice Sotomayor, you had asked earlier
10 whether this provision was designed as an act of
11 clemency or was instead designed as a kind of adjunct to
12 the court's judicial review power, a kind of 2255-type
13 power. We think the answer is clearly that it was
14 designed as a mechanism for the exercise of a type of
15 clemency power. I think that is particularly clear if
16 you look at the parallel provisions in section
17 3582(c)(1) which are reprinted at pages 3a and 4a of the
18 appendix to the government's brief.

19 Those provisions also provide for similar
20 types of sentence reductions in cases where the director
21 of the Bureau of Prisons makes a motion for sentence
22 reduction based either on extraordinary and compelling
23 reasons or because the defendant is over the age of 70
24 and has served more than 30 years in prison.

25 In all of these cases the district court

1 exercises a discretionary power to reduce the sentence
2 in the exercise of leniency, not because of legal error
3 but for ethical reasons.

4 JUSTICE SOTOMAYOR: Well, that gets tied up,
5 doesn't it, to your argument that this is not a part of
6 the criminal prosecution, that this is -- not a Sixth
7 Amendment proceeding, but some -- not a Sixth Amendment
8 proceeding, so it doesn't require constitutional
9 protection?

10 MS. KRUGER: That's correct, Justice
11 Sotomayor. We think that what Congress has called for
12 in all of the sentence reduction provisions of section
13 3582(c) is a kind of discretionary mechanism for
14 reducing sentences that are already final and not
15 appealable and can't be modified in any other respect.
16 It hasn't called for a de novo plenary resentencing. So
17 it allows defendants in the position that Petitioner is
18 in to come into court and reopen every aspect of their
19 sentence, requiring reconsideration of guidelines
20 determinations made in this case more than a decade ago
21 or requiring application of intervening changes in the
22 law.

23 JUSTICE STEVENS: Am I correct in
24 understanding that 3582(c) was enacted prior to our
25 decision in Booker?

1 MS. KRUGER: Yes, it -- it was.

2 JUSTICE STEVENS: And is it clear that it
3 should be construed as though the system was mandatory
4 before the decision in Booker, rather than construed in
5 the light of the remedial decision in Booker?

6 MS. KRUGER: Well, I think there are two
7 questions that are raised here about how this statutory
8 scheme comports with Booker. One is the Sixth Amendment
9 question, whether this is a statutory provision that
10 calls for a resentencing, at which Booker and its
11 decision about the Sixth Amendment would apply.

12 And then the second question is even if you
13 think there is no constitutional problem with reading
14 the statute in accordance with its plain terms, whether
15 Booker's remedial analysis requires treating the
16 reference to the policy statements in section 3582(c)(2)
17 as purely advisory.

18 We think with respect to that question, not
19 even Petitioner is quite willing to embrace the full
20 consequences of that argument. It would mean severing
21 and excising the portion of 3582(c)(2) that requires
22 consistency with the applicable policy.

23 JUSTICE STEVENS: Right. Is that any more
24 dramatic change than was made in the Booker remedial
25 opinion itself?

1 MS. KRUGER: I'm not sure whether or not
2 it's a more dramatic change in terms of the number of
3 case that is would be affected, but it --

4 JUSTICE STEVENS: The remedial opinion
5 basically rewrote the whole statute on -- except that it
6 didn't have to reach 3582(c)(2), but it certainly
7 changed the -- the nature of the mandatory provisions
8 that were previously in the statute.

9 MS. KRUGER: That's true, and it did so in
10 order to solve the constitutional difficulties that were
11 created by a mandatory guidelines system with respect to
12 the imposition of sentence.

13 Without that same kind of Sixth Amendment
14 violation in the context of discretionary sentence
15 reduction proceedings, we think there is no basis in
16 Booker's analysis for severing and excising any portion
17 of 3582(c)(2), but I would note that the consequence of
18 severing and excising the requirements' consistency with
19 the applicable policy statements would be to free
20 district courts not only from the sentencing
21 commission's specifications about how much to reduce
22 sentences, but also which of its amendments to the
23 guidelines would justify retroactive application.
24 Because it is after all in a policy statement, section
25 1B1.10, that the sentencing commission has specified

1 which of its amendments, among many, justify sentence
2 reductions under 3582(c)(2). That would mean that every
3 time the sentencing commission revises its guidelines
4 and reduces applicable sentencing ranges, any number of
5 defendants would be free to come to the district courts
6 and ask them to make their own independent judgment
7 about whether or not they should be effectively
8 resentenced as a consequence. And that would certainly
9 provide a significant disincentive for the sentencing
10 commission ever to revise sentencing guidelines in a
11 downward direction.

12 JUSTICE GINSBURG: Have there been other
13 guidelines ranges that have been reduced, and if so were
14 those also retroactive?

15 MS. KRUGER: There have -- there have been
16 many guidelines, ranges that have been reduced over the
17 course of the existence of the sentencing guidelines. I
18 believe that right now, the current number of -- of
19 guidelines amendments the sentencing commission has made
20 retroactive stands at 27.

21 This was the -- one of the first decisions
22 that the sentencing commission made about retroactivity
23 in the wake of Booker, and it did so with full
24 consciousness of the potential for broadly reopening
25 sentences. And it certainly weighed very heavily in the

1 sentencing commission's deliberations that the
2 traditional understanding, existing long before Booker
3 was ever decided, was that 3582(c)(2) proceedings do not
4 constitute plenary resentencings that incorporate all
5 intervening changes to the law.

6 JUSTICE BREYER: Can -- can I ask you a
7 different question on the secondary argument that they
8 make? When I read the secondary argument, that there
9 was an error in the calculation of the guidelines and
10 she would like to have that error corrected, I didn't
11 see anything in the policy statement that would prevent
12 her from getting that correction.

13 JUSTICE GINSBURG: I think you told me -- I
14 asked you that question, and you told me it could not be
15 corrected, because everything was final.

16 MS. KRUGER: That's correct --

17 JUSTICE BREYER: Why?

18 MS. KRUGER: -- and the policy statement
19 actually also --

20 JUSTICE BREYER: What in the policy
21 statement? Because what it says is: What you're
22 supposed to do is judge; you go and look at the
23 guidelines that were applied.

24 Now, substitute the new one reducing the
25 sentence for the old one, and then go apply it. And

1 therefore, that seems to me not to block a claim that
2 would say, when you apply these guidelines with the new
3 one substituted for the old one, apply them; that is,
4 if, in fact, there was an error the first time. Now,
5 she may have a hard time showing that, but if she can
6 show it, what in the words that are right there in
7 (b)(1) stops her from getting that correction?

8 MS. KRUGER: It's on page -- if you look at
9 page 8A of the appendix --

10 JUSTICE BREYER: I have it. I have it in
11 front of me.

12 MS. KRUGER: In the final sentence, it says,
13 "In making such determination, the Court shall
14 substitute only the amendments listed in subsection C
15 for the corresponding provisions that would apply, and
16 shall leave all other guideline application decisions
17 unaffected."

18 JUSTICE BREYER: Well, all other guideline
19 application decisions, their claim is that they just
20 made an error, like a clerical error, a clear error,
21 manifest injustice, in that first math. Do you think
22 that this would leave them unaffected?

23 MS. KRUGER: I do.

24 JUSTICE BREYER: Yes.

25 MS. KRUGER: I think that that is the plain

1 meaning of the sentencing commission's directive there.

2 JUSTICE SCALIA: I guess they also made a
3 mistake in not applying Booker, right?

4 MS. KRUGER: Well, the premise of that
5 question, I think, assumes two things. It assumes that
6 3582(c)(2) proceedings are plenary sentencings at which
7 Booker applies, which the sentencing commission, based
8 on a very long history of rejections, precisely --

9 JUSTICE BREYER: I would have thought the
10 objection to that is: No, they didn't make a mistake in
11 applying Booker, because this Court has said that Booker
12 isn't retroactive. And of course, they did make a
13 mistake if it is retroactive. And then the Court should
14 have said, it is retroactive, in which case there would
15 be no problem.

16 MS. KRUGER: Well, if Booker were
17 retroactive, I think that our position would still be
18 that this is not the proper vehicle for applying it.
19 The proper vehicle would be to file a motion for -- to
20 vacate or set aside the sentence under section 2255.

21 Congress didn't intend these sentence
22 reduction proceedings to serve essentially the same
23 purpose. It -- it intended them to serve simply the
24 purpose of reducing otherwise final, non-appealable
25 sentences. I would say --

1 JUSTICE BREYER: I know my word was: It
2 shall leave all other guideline application decisions.
3 Well, that's -- that's -- their claim is not that the
4 guideline -- it's that they -- they chose the wrong
5 guideline or they didn't apply the right words. You
6 see, so they weren't applying that -- they just applied
7 the wrong thing. Now you say I'm working too hard.
8 Okay.

9 MS. KRUGER: I think you may be working a
10 little hard, Justice Breyer. I would say that on that
11 point, we also fundamentally disagree with Petitioner's
12 submission that there was any error in the calculation
13 of his criminal history score in 1993.

14 But to the extent that Petitioner wanted to
15 raise any challenges to that determination, we think the
16 appropriate time and place to do that would have been on
17 direct appeal of that sentencing decision, rather than
18 waiting a decade and attempting to use the 3582(c)(2)
19 proceedings as a kind of vehicle for collaterally
20 reopening that aspect of his sentence.

21 JUSTICE KENNEDY: When the judge considers
22 the adjustment motion under the -- under the section,
23 does he consider how the prisoner has behaved in prison;
24 i.e., if he has behaved very badly, he doesn't give
25 the -- the reduction?

1 MS. KRUGER: The district court can consider
2 any disciplinary proceedings that have occurred in the
3 course of the defendant's imprisonment, yes.

4 JUSTICE KENNEDY: But he -- but he cannot go
5 below.

6 The -- the Petitioner makes the argument
7 metaphysically that there is just a new sentence. In
8 your view, is that refuted by the language of (c)(2)
9 because they talk about an occasion of a defendant who
10 has been sentenced to a term of imprisonment, and then
11 they say the term can be reduced, and it doesn't use the
12 words "a new sentence shall be imposed"? I assume that
13 is your argument.

14 MS. KRUGER: I mean, I think that that
15 certainly reinforces the conclusion that I think also
16 arises from other aspects of the provision that -- what
17 Congress had in mind was not the imposition of a
18 brand-new sentence, but simply a discretionary reduction
19 of the old one. I think that's right, Justice Kennedy.

20 CHIEF JUSTICE ROBERTS: I am troubled by
21 your response to Justice Kennedy's previous question,
22 that the judge can take into account conduct in prison
23 and all these other things. It does seem to open it up
24 to other factors than the crack cocaine disparity, and
25 once you are looking at other factors, why not look at

1 everything?

2 MS. KRUGER: Well, I think the answer to
3 that question is resolved by looking at the plain text
4 of 3582(c)(2), Mr. Chief Justice, which directs that
5 district courts have a discretion to reduce sentences in
6 a manner that is consistent with applicable policy
7 statements, but after considering the statutory
8 sentencing factors under section 3553(a), which
9 includes, of course, the need to protect the public from
10 future crimes committed by the defendant, as well as the
11 history and characteristics of the prisoner.

12 The reference to 3553(a) guides district
13 courts' discretion in deciding whether or not to grant a
14 reduction that's authorized by the sentencing commission
15 in the course of its statutory duty under 994(u) to
16 specify whether and to what extent its methods justify
17 retroactive application.

18 JUSTICE KENNEDY: It's a one-way ratchet?

19 MS. KRUGER: Effectively. I mean, it works
20 in both directions. It can justify granting a
21 reduction; in the case of Petitioner, the district court
22 thought that the 3553(a) factors clearly pointed in
23 favor of granting the reduction, but it also -- those
24 factors can work in the direction of denying an
25 otherwise available reduction.

1 JUSTICE KENNEDY: The Petitioner's brief
2 opens with a statement about his rehabilitation. We
3 don't know if that has been contested. You don't
4 respond to it. But let's assume that's all true. He
5 established schools and he helped young people and so
6 forth.

7 Does the Justice Department ever make
8 recommendations that prisoners like this have their
9 sentence commuted?

10 MS. KRUGER: I am not aware of the answer to
11 that, Justice Kennedy. It's certainly true that
12 evidence of that type of rehabilitation factored into
13 the government's recommendation in this case that
14 Petitioner --

15 JUSTICE KENNEDY: And isn't the population
16 of prisoners in the Federal prisons about 185,000 now?

17 MS. KRUGER: I think --

18 JUSTICE KENNEDY: I think it is. And how
19 many commutations last year? None. How many
20 commutations the year before? Five.

21 Does this show that something is not working
22 in the system? 185,000 prisoners? I think that is the
23 number.

24 MS. KRUGER: I -- I'm not prepared to speak
25 to that question today, Justice Kennedy. I can tell you

1 that the government very much takes those considerations
2 into account in making recommendations about available
3 sentence reductions under section 3582(c)(2).

4 And indeed, in this case, the government
5 agreed that the Petitioner should receive the full
6 measure of the benefit that the sentencing commission
7 had made available when it decided to make the crack
8 cocaine amendments retroactive, based in large part on
9 Petitioner's conduct in presenting and his other
10 characteristics.

11 JUSTICE STEVENS: May I ask this question?
12 Accepting the point that there is no constitutional
13 compulsion that they had to open up for a full new
14 sentencing, and I understand one reason for not doing it
15 is that you don't impose too much work on the district
16 courts for doing it, but could you explain to me: Why
17 is it, just as a matter of policy and good judgment, the
18 commission could say, well, you can take a look at all
19 the negative factors that argue against reduction, but
20 you cannot look at any of the factors that would show
21 why you should have had the same sentence that if -- why
22 you should get the kind of sentence you would have
23 gotten if you had been sentenced in the first place
24 today?

25 Because I guess this particular math is

1 going to mean spend 22 more years in jail than if you
2 had been sentenced today.

3 MS. KRUGER: The reason why the commission
4 doesn't do that is because it wouldn't comply with its
5 statutory mandate under 29 U.S.C. 994(u) to specify both
6 which guidelines amendments justify retroactive
7 application and the amount by which sentences may be
8 reduced.

9 The sentencing commission would have no
10 power to simply say in its policy statement: District
11 courts, you are free to reduce sentences by however
12 much amount you believe is appropriate.

13 JUSTICE STEVENS: You think that the statute
14 would have prohibited a more generous policy statement,
15 then?

16 MS. KRUGER: I think the statute would have
17 prohibited such a policy statement. Yes, that's
18 correct, Justice Stevens.

19 JUSTICE SCALIA: I -- I still don't
20 understand how you fit into that your answer to the
21 Chief Justice earlier that, in fact, the Court can
22 consider other factors in -- in 3553(a) when it's making
23 the reduction.

24 MS. KRUGER: Justice Scalia, I think the
25 answer is simply that the 3553(a) factors and their

1 consideration under 3582(c)(2) is designed for a
2 different purpose than for the consideration that goes
3 into the initial imposition of the sentence.

4 The point of considering the 3553(a)
5 factors, to the extent they are applicable to use the
6 words of 3582(c)(2), is to just to determine whether or
7 not the district court will grant a reduction that is
8 authorized to the extent it is authorized by applicable
9 policy statements. It is not to determine whether the
10 resulting sentence, as an original matter, is greater
11 than necessary to comport with the statutory sentencing
12 factors. It's simply for the limited purpose of
13 deciding whether to exercise discretion to reduce the
14 sentence in a manner that is authorized by the statute.

15 JUSTICE SCALIA: I see. But -- but I
16 thought you said you could take into account good
17 behavior in that determination? But that isn't a
18 factor -- that isn't a factor that would cause you had
19 to disallow the reduction. It's a factor --

20 MS. KRUGER: It's a factor that would cause
21 you to permit the reduction, presumably. It's one of
22 the many considerations that a district court can take
23 into account in deciding that it will, in fact, exercise
24 its discretion to reduce the sentence to the extent that
25 that is permitted by Congress and applicable policy

1 statements.

2 CHIEF JUSTICE ROBERTS: But it -- it's also
3 a factor that would -- might guide the district court to
4 a decision not to reduce the sentence.

5 MS. KRUGER: That's correct. It can point
6 in either direction in any given case.

7 But the critical point is that Congress has
8 set the parameters for the district court's exercise of
9 discretion in these proceedings. Whatever the district
10 court chooses to do has to be consistent with applicable
11 policy statements, including the commission's policy
12 statement in which its implemented its statutory
13 authority to specify whether and to what extent its
14 guidelines amendments will justify retroactive
15 application.

16 If the Court has no further questions, we
17 would ask that the judgment of the court of appeals be
18 affirmed.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Ms. Kruger.

21 Ms. Freeland, have you three minutes
22 remaining.

23 MS. FREELAND: I'm sorry, Mr. Chief Justice,
24 how many minutes?

25 CHIEF JUSTICE ROBERTS: Three.

1 REBUTTAL ARGUMENT OF LISA B. FREELAND

2 ON BEHALF OF THE PETITIONER

3 MS. FREELAND: Three minutes, thank you.

4 A couple of points. I wanted to answer
5 Justice Kennedy's question. The court is not only
6 permitted to consider bad behavior in prison, under
7 1B1.10, the court is required. The word is "shall."
8 And, so, all of these things and many of your questions
9 point to the fact that this is an adversarial
10 proceeding.

11 Section 3582(c) describes a sentencing. It
12 requires the court to consider all of the 3553(a)
13 factors. It requires the court to be consistent with
14 policy statements. It requires a court to impose a new
15 sentence.

16 And the word "modification" that is used in
17 3582(c) connotes correction, not leniency, not grace.
18 Those are functions of the executive branch, not of the
19 judicial branch. And in this context the court decided
20 after the commission reduced the sentencing -- the
21 sentencing guidelines for crack offenders, that a
22 correction was warranted. There was an error in the
23 prior sentence that 3582(c) permitted the district court
24 to correct, and when it imposed a new sentence, that new
25 sentence has to comport with current law.

1 JUSTICE GINSBURG: Can I get you to go back?
2 You said something that only the executive can grant
3 clemency. What -- what about a program where a district
4 court judge says I'm going to have this person undergo a
5 course -- a drug addiction course, and if the defendant
6 successfully passes the course, then I will give a
7 lighter sentence? That -- that --

8 MS. FREELAND: Justice Ginsburg -- I'm
9 sorry.

10 JUSTICE GINSBURG: Did your answer exclude
11 that -- that possibility?

12 MS. FREELAND: Justice Ginsburg, your
13 hypothetical, the court is imposing a sentence or
14 conditions of a sentence, and once those conditions have
15 been met, the defendant is relieved, just as when the
16 conditions of a sentence of imprisonment have been met,
17 the defendant is released from prison.

18 One point that I would like to get back to,
19 because there were many questions about it, is this
20 consistent with policy statements. Policy statements by
21 definition do not bind. The sentencing commission in
22 this case changed the 1B1.10 to say that the sentencing
23 court could not, shall not impose a sentence below the
24 guideline range. 1B1.10 for all of the 26 retroactive
25 amendments that preceded the crack amendment read

1 district courts should sentence within the amended
2 guideline range, and that is appropriately a policy
3 statement. 1B1.10(b)(2)(A) is not a policy statement.
4 It purports to be a binding rule. And as this Court
5 knows, policy statements do not bind.

6 JUSTICE BREYER: Yes, but they do if
7 Congress says they do.

8 MS. FREELAND: When Congress says consistent
9 with policy statements -- and, Your Honor, I would
10 direct you -- I see my red light is on, if I could
11 finish --

12 CHIEF JUSTICE ROBERTS: You can answer
13 Justice Breyer's question.

14 MS. FREELAND: I would direct you to the
15 amicus brief on behalf of the defenders at pages 23 and
16 24 and our reply brief at pages 25 and 26.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MS. FREELAND: Thank you very much.

19 CHIEF JUSTICE ROBERTS: The case is
20 submitted.

21 (Whereupon, at 11:00 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

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